Supreme Court of the United States.

No. 199.

THE UNION INSURANCE COMPANY, CLAIMANT, APPELLANT.

vs.

THE UNITED STATES ET AL, APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF OF COUNSEL OF UNION INSURANCE COMPANY, CLAIMANT AND APPELLANT.

On the 8th October, 1861, Leonce Burthe, of New Orleans, by an act before a notary public, acknowledged an indebtedness to the Union Insurance Company of that city in the sum of $3,500, for which he gave his note, bearing eight per cent. interest, at one year's date, and to secure its payment specially mortgaged in favor of the company three undivided twenty-fifths of a certain parcel of ground in New Orleans, fronting on Delord street, and the buildings and improvements thereon. (See act of Mortgage, Rec. pp. 22 to 25.)

This note was not paid by the drawer, and the Union Insurance Company, the mortgage creditor, commenced suit against Burthe, the drawer, in the sixth District Court of New Orleans, to enforce their mortgage rights against the property. (See Rec. pp. 25 and 26.)

This sixth District Court ordered execution on the 15th of January, 1864. (Rec. p. 26.)

The sheriff, after due proceedings, adjudicated the property, at public sale, to the mortgage creditor, (see Rec. pp. 27 and 28,) and the sheriff's deed was recorded in the conveyance office of New Orleans on the 12th March, 1864. (See Rec. p. 28.)

Before this mortgage from L. Burthe to the Union Insurance Company, the former had leased the property, together with the larger parcel of which it formed a part, and also the buildings thereon, to Cook for three years, for a rent of $3,600 a year. (See Rec. pp. 20 and 21.)

The premises were soon after employed by Cook for the purpose of manufacturing arms, guns, swords, and cutlasses for the rebels; and this continued from October, 1861, until April, 1862, when the United States fleet appeared before the city, and the Cooks fled. (See Rec. pp. 8 to 10.)

On the 5th of April, (Rec. p. 4,) 1865, the United States Attorney in New Orleans libelled the property under the act of August 6, 1861. (12 Statutes at Large, p. 319. See Rec. pp. 1 to 5.)

Whereupon the Union Insurance Company intervened and claimed the three twenty-fifths of the property mortgaged and sold to them as above set forth. (Rec. pp. 5 to 7.)

After hearing evidence and argument the judge below gave judgment condemning the property "as forfeited to the United States." (See Rec. p. 47.)

From this judgment the Union Insurance Company has appealed.

Points.

First. The use made of this immovable property by the lessees, the Cooks, being plainly in aid of the insurrection, would entail liability to confiscation, not of itself, but only if such use were *consented* to by the owner. (Act of 1861 sec. 1; 12 Statutes at Large, p. 319.)

There is no proof that this owner consented to such use.

Second. Unlike the act of 17th July, 1862, (sec. 6, 12 Statutes at Large, p. 589,) this act of 1861, upon which the proceedings are founded, does not declare sales, transfers, and conveyances of property prior to seizure, but subsequent to guilty use, to be null and void; and the Government takes the property on condemnation *cum onere*.

Third. The consent of the owner to the guilty use of the premises is not a matter of inference; it must be proved. His silence merely shows nothing, because it would have been dangerous for him to attempt to interfere. (See test. of Hofer, J. M., Rec. p. 9.)

And as such consent would have been criminal, making the owner guilty of treason, it cannot be presumed against him. (1st Greenleaf on Ev. secs. 34 and 35.)

Fourth. On the 5th of April, 1865, when the United States

Marshal seized the property, it had ceased to belong to the owner who leased, and had become by judicial sale the property of the claimant. (Record p. 28.)

Fifth. The act of August 6, 1861, does not forfeit the property, but merely directs legal proceedings to procure its forfeiture. The title to the property was not divested by the guilty use, and could only be divested at the moment of legal sentence of condemnation. (Fire Department *vs.* Kip, 10 Wendell, p. 268.)

Sixth. Confiscation, when decreed, relates back to the date of the guilty use, but *bona fide* purchasers or holders of liens created in the meantime are protected. (The United States *vs.* Grundy, 8 Cranch. 338.)

Clark *vs.* Protection Ins. Co., 1 Story, p. 110.
Mongin *vs.* Baker, 1 Bay S. C. Reports, p. 73.
Wells *vs.* Martin, 2 do., p. 20.

Respectfully submitted,

THOMAS J. DURANT,
For Union Insurance Company.

MARCH 28, 1867.

In the Supreme Court of the United States.

DECEMBER TERM, 1866.

THE UNION INSURANCE COMPANY OF NEW ORLEANS, intervenors and appellants,
vs.
THE UNITED STATES and CRAFTS J. WRIGHT *et al.*

No. 199.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

This is a case of confiscation upon a libel framed under the act of Congress of August 6, 1861, (12 Stat., 319,) entitled "An act to confiscate property used for insurrectionary purposes," in which it is provided, "If, during the present or any future insurrection against the government of the United States, after the President of the United States shall have declared, by proclamation, that the laws of the United States are opposed and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshals by law, any person or persons, his, her, or their agent, attorney, or employé, shall purchase or acquire, sell or give, any property, of whatever kind or description, with intent to employ the same, or suffer the same to be used or employed, in aiding, abetting, or promoting such rebellion or resistance to the laws, or any person or persons engaged therein, or if any person or persons, being the owner or owners of any such property, shall knowingly use or employ, or consent to the use or employment of the same as aforesaid, all such property is hereby declared to be lawful subject of prize and capture wherever found; and

it shall be the duty of the President of the United States to cause the same to be seized, confiscated, and condemned."

The subject of the proceeding is a tract of ground in the city of New Orleans, with buildings, &c, proved to have been used and employed for the purpose of manufacturing and furnishing to the insurgent authorities guns, carbines, cutlasses, swords, and other arms and implements of war, during a period beginning in the autumn of 1861 and terminating at the capture of the city by the United States forces in April, 1862. (Rec., pp. 8, 9, 10.) The factory was carried on by Cook & Brother, who were lessees of one Leonce Burthe, under a lease dated September 18, 1861, (Rec., p. 20,) in which the nature of the business to be carried on is mentioned.

The libel was filed on the 4th of April, 1865, in the circuit court of the United States for the eastern district of Louisiana, process of monition issued on the 5th, and seizure was made on the same day. (Rec, pp. 3, 4.) Three interventions were made:

1. On behalf of the *Union Insurance Company of New Orleans*, their president, Achille Chiapella, represented to the court that on the 26th day of February, 1864, he, for the use of said corporation, became the owner of three twenty-fifths (undivided) of a tract which he describes (the same being embraced in what is libelled) by judicial sale, under a proceeding substantially foreclosing a mortgage in favor of the intervenors, which had been executed on the 8th of October, 1861, by Leonce Burthe, the same who on the 17th of September previously had leased the premises to Cook & Brother. (Rec., pp. 5, 6, 22, 25) The debt of Burthe to the intervenors for which the mortgage had been given not being fully satisfied by the three twenty-fifths aforesaid, suit was instituted, and judgment having been obtained for the balance, the remainder of the property of Burthe, being twenty-two twenty-fifths, (undivided,) was seized by the sheriff on the 11th April, 1864, who was prevented from advertising and selling it by a military

order of the United States authorities. (Rec., p. 30) These intervenors claim that so much of the estate libelled as was the property of said Leonce Burthe, and which they describe in their petition, being in twenty-five undivided shares, is exempt from confiscation—three of said shares as being their lawful property, and twenty-two shares as covered by their vested privilege of priority for the satisfaction of the judgment debt owing them. They do not expressly disclaim consent, as mortgagees, to the use and employment which have tainted the property, but declare their ignorance of the matters of fact alleged in the libel, declining either to admit or deny them, and disclaiming the applicability to themselves of the legal inferences to be drawn from said facts. (Rec., pp. 5, 6.)

2. *Crafts J. Wright*, a citizen of the State of Ohio, represents that on the 25th of April, 1864, he obtained judgment in the United States circuit court at New Orleans for eight thousand and odd dollars against said Leonce Burthe; that in pursuance of said judgment the United States marshal, on the 25th of August, 1864, seized and took into possession the interest of Leonce Burthe in the property described in the libel, and was proceeding to advertise and sell the same. He does not distinctly state what interrupted the sale. He claimed a priority for the satisfaction of his debt, averring, as in the above intervention, as to facts charged in the libel and inferences therefrom. (Rec., pp. 11, 12.)

3. *Edmund Burthe, Paul Louis Burthe, and Dominique F. Burthe*, minors, together with three others, not minors, intervened for their respective undivided interests. (Rec., pp. 14, 15.)

All the claimants aver their loyalty, and the record shows the several conveyances, mortgages, decrees, &c., substantially as represented in the petitions.

The court dismissed the claims of Wright, of the Union Insurance Company, and of the adults who had joined in the intervention of the minors Burthe, and condemned the property

described in the libel, excepting four undivided twenty-fifths thereof. Of these parts, two twenty-fifths were adjudged to Edmund Burthe, and one twenty-fifth each to Paul Louis Burthe and Dominique F. Burthe, being the minors aforesaid. (Rec., p. 47.) From this judgment one appeal only was taken—that of the Union Insurance Company. The question is upon the sufficiency in law of their claim.

ARGUMENT.

It is apparent that the principal question is one of law, and to our mind one of great simplicity.

That Cook & Brother were engaged in manufacturing arms for the insurgent government in the city of New Orleans during June, 1861, and from thence, employing four hundred hands, more or less, until the capture of that city by the federal forces; (Rec., pp. 8, 9, 10;) that this fact must have been notorious in that community, and must have been known to Leonce Burthe, the owner of the libelled property, and to the appellants; (Rec., pp. 41, 42, 43, for ownership;) that said Leonce Burthe, on the 17th of September, 1861, executed a lease, in which he contracted with said Cook & Brother for the use by them of this property for the express purpose of continuing the carrying on of the business of the firm, the term to begin on the 1st of October, 1861; (Rec., p. 20;) that in this lease there were express stipulations against under-letting, or transferring the lease, but none against unlawful use of the property; (Rec., p. 21;) that no mortgage or lien in question had at that date attached to this estate; that the mortgage executed in favor of the appellants was subsequent in time, being of date 8th of October, 1861; (Rec, p. 22;) and that the appellees, though "neither admitting nor denying" the knowledge, must have known the fact that at the time of, and both previously and subsequently to, the execution of the mortgage, Cook & Brother were conducting upon the land and within the buildings mortgaged a manufactory of hostile arms and implements of war—are all indisputable facts.

Whether, as mere mortgagees, they were bound to protest against continuing to jeopard their security, if it was a security, by unlawfully using the mortgaged premises, may be questioned without affecting the fact that they do not expressly deny that, to the extent of their interest in the *res*, they have always consented to the unlawful use. Nor could it be pretended that these mortgagees were without notice of the guilty use, or of its legal effect. An act of Congress (6th of August, 1861, *supra*) was in force, declaring property in the predicament in which this stood when their mortgage was made, "lawful subject of prize and capture." The mortgage, then, was a mortgage of property "lawful subject of prize." And whatever may be affirmed of the mortgage executed in favor of the Union Insurance Company, appellants, must apply *a fortiori* to their title under its foreclosure and their claim of an attaching lien by force of a judgment and levy subsequent in time to both, (Rec., pp. 27, 28,) on which a sale in their favor of this forfeited property was frustrated by the interposition of an officer of the United States. (Rec., p. 30.)

The language of the statute is distinct and unequivocal. It sets forth in detail the predicament of the property, which is to be the subject-matter of the law. It then says, "*All such property is hereby declared to be lawful subject of prize and capture wherever found.*" We submit that these words import the same as if the language had been, "All such property is hereby declared to be forfeited to the United States from the time and by reason of the offence." The concluding words would as fitly follow the one phrase as the other; "*And it shall be the duty of the President of the United States to cause the same to be seized, confiscated, and condemned.*" To cause "*the same* to be seized," &c., *i. e.*, such property as had been forfeited by offence. (12 Stats., 319.) Hence, if there were no rule governing the case, the statute itself discountenances even *bona fide* interests subsequently attaching without notice. But the rule is, we believe, settled in this court, that a forfeiture in this country, under a statute which does not otherwise direct, attaches at the time of the offence.

(Caldwell *v.* United States, 8 How., 366. United States *v.* Grundy, 3 Cranch, 350. United States *v.* 1,960 bags coffee, 8 Cranch, 399. The Mars, ibid., 417. The Palmyra, 12 Wheaton, 1. Peisch *v.* Ware, 4 Cranch, 347. The Ploughboy, 1 Gallison, 41)

The only question, therefore, as it appears to us, is, whether there is anything in favor of the appellants to support an exception to the general rule. We think not, because—

1. The rule is fortified by the sense of the statute.

2. No precedent can be shown of a successful intervention by a subsequent purchaser who had knowledge of the predicament of the forfeited property when his interest attached.

(*a.*) In *Wells* v. *Martin*, 2 Bay, S. C. R., 20, the interest in question was not a *subsequent* but a *prior* interest, and one of no less good faith and sanctity than a widow's dower. The same of *Mongin* v. *Baker*, 1 Bay, 73. *The Fire Department* v. *Kip*, 10 Wendell, 266, is the case of a forfeiture created by the statute altogether *conditionally*. If no person should sue for the forfeiture, it was not to take place so as to divest the property from the owner; and if the suit should not be brought within two calendar months, the property was to be virtually exonerated. But the present is a case of absolute statutory forfeiture to the United States, without conditions of suit or time, to be merely consummated by seizure and condemnation. In *Clark* v. *Protection Insurance Company*, 1 Story, 110, the syllabus "when property is forfeited it does not vest in the government until after a seizure, which then relates back to the time of the forfeiture," is less qualified than the language of Mr. Justice Story in the decision itself, for what he says under that head (p. 134) he expressly reconciles with *United States* v. *Bags of Coffee* and *The Mars*, hereafter referred to. But at the most, that case does not countenance mesne incumbrances.

In *The United States* v. *Grundy*, 3 Cranch, 350, Chief Justice Marshall distinctly disallows the common law doctrine

of the property remaining in the owner until divested by consummation of the forfeiture, (and then relating back, subject in some degree to mesne interest,) as to this country; declaring in effect that it is in every case a question of construction of the statute, the test being the will of the legislature rather than the principle of the subject.

The above cases are cited by the appellants.

(*b*) In support of the proposition that this record affords no color of right in the appellants, we cite, first, the more recent case of *Caldwell* v. *United States*, (8 How., 366,) in which this court held:

That under the 68th section of the act of 1799, which declares a forfeiture of goods *without an alternative of their value*, the forfeiture attached *at the moment* the offence was committed, and avoided all *intermediate sales* of them between the commission of the offence and the condemnation, but that under the 66th section of the same act, in which the forfeiture is of the goods *or* their value, the United States has no title in the property until an election has been made either to recover the goods or their value, and, therefore, under this section, any rights in them acquired *bona fide* by third persons in the mean time are protected.

Mr. Justice Wayne said: "In the first (the sixty-eighth section of the act of 1799) *the forfeiture* is the *statutory transfer of right to the goods at the time the offence is committed.* If this was not so, the transgressor, against whom, of course, the penalty is directed, would often escape punishment, and triumph in the cleverness of his contrivance by which he has violated the law."

It will be observed that the act of 6th August, 1861, provides only for the forfeiture of the *property*, without an alternative of its value, and, therefore, the forfeiture must be deemed to attach at the moment the offence is committed, avoiding all intermediate sales or liens between the commission of the offence and the condemnation.

(c) In support of the same proposition we cite the leading case of *United States* v. 1,960 *Bags of Coffee*. (8 Cranch, 398 *et seq.*)

This was a case under the celebrated non-intercourse act of March 1, 1809, in which the forfeited goods had been *innocently purchased without notice, after having been regularly entered at the custom-house and the duties lawfully secured.* The ignorance and good faith of the purchaser were not questioned, nor was it pretended that he was even imprudent in presuming the innocence of goods which had passed the custom-house. The case was one, therefore, of extreme hardship. In the circuit court the naked subtlety of guilty property vesting *eo instanti* in government did not withstand the stress of this persuasive and substantial equity. In Mr. Justice Story's circuit, the strictly analogous case of *The Mars* yielded in the same manner. Both were on appeal at one term. Mr. Justice Johnson, in delivering the brief and stern opinion of the court, (p. 405,) construes the words in the statute "*shall be forfeited*," for none more express appear in it to the point, (2 Stat., 528 *et seq.*,) as words "by which it is expressly declared that the forfeiture shall take place upon the commission of the offence." The decision reversed the judgment below, *and sustained the demurrer of the United States to the claimant's plea that the goods had been regularly entered*, &c. Mr. Justice Story said that this result was decisive of the case of the Mars, and he thought fit, as expressing his dissent, to introduce the opinion which he had given in the latter case. From that, however, we quote:

"It should be remembered that this is not a case where the vendor was out of possession, and, of course, where the *law might infer a want of due diligence in the purchaser. To such a case the maxim caveat emptor would certainly apply.*" (P. 407.)

"Further, the statute has declared that the property shall be wholly forfeited if the offence be committed, but it has not

declared at what time it shall take *effect*, to what time it shall *relate*, nor whether it shall be incapable of being *purged by subsequent events*." (P. 407.) It is otherwise with the act of August 6, 1861.

In conclusion, we cite from the same learned judge a well fortified dictum, which we take to be fairly in point.

"I adopt the doctrine of Lord Holt in *Bartlett* v. *Vinor*, Carlton R., 252, and of Lord Chief Justice Tyndal in *De Begnis* v. *Armistead*, 10 Bingh. R., 107, 110, that every contract made for or about a matter or thing which is prohibited and made unlawful by statute, is a void contract, although the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition although there are no prohibitory words in the statute. In other words, every statute imposing a penalty imports a prohibition and makes the prohibited act illegal." Story, J., in *Clark* v. *Protection Ins. Co.*, 1 Story, 122. *A fortiori*, where ignorance is out of the question.

We submit that the decree of condemnation should be affirmed.

HENRY STANBERY,
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J. HUBLEY ASHTON,
Asst. Attorney General.